

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

75-6065

(42343)

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF NEW YORK,

Plaintiff-Appellant,

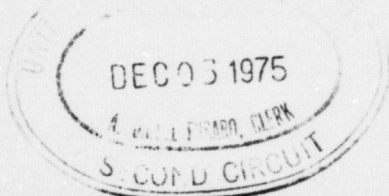
—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

JOINT APPENDIX



SAMUEL J. WARMS,
RAYMOND HERZOG,
CORNELIUS F. ROCHE,
of Counsel.

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United States Attorney for the
Southern District of New York,
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JOHN S. SIFFERT,
of Counsel.

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INDEX

	PAGE
Relevant Docket Entries	1a
Complaint	4a
Plaintiff's Exhibit A, Annexed to Complaint— Copy of Refund Claim	9a
Plaintiff's Exhibits A-1 through A-3, Annexed to Complaint—Plaintiff's Amended Refund Claims	11a
Plaintiff's Exhibit B, Annexed to Complaint— Copy of Rejection Letter to Plaintiff from Internal Revenue Service	12a
Opinion of Cannella, D.J.	13a
Judgment of Cannella, D.J.	27a



JOINT APPENDIX**Relevant Docket Entries**

<i>Date</i>	<i>Proceedings</i>
Apr. 4, 1974	Filed Complaint. Issued Summons.
Apr. 16, 1974	Filed summons with return Served U.S. Atty General Wash. D.C. Reg Rept. 161407 4-5-74. U.S. Atty.
May 30, 1974	Filed Answer of deft.
July 19, 1974	Filed deft's first set of interrogs. and request for documents.
July 25, 1974	Filed deft's affdvt. of service of mailing by Pauline Troia
Aug. 21, 1974	Filed plttf's answers to interrogs. (a), (b) and (c) and objections to interrog. (d)
Oct. 8, 1974	Filed deft's notice of motion for an order to dismiss the complaint or in the alternative to compel. Ret. 10-22-74.
Oct. 8, 1974	Government's memorandum of law.
Oct. 7, 1974	Pre-trial conference held by Raby, U.S. Mag.
Oct. 24, 1974	Filed stip & order that the time for pltf. to serve any answering papers in opposition to deft's motion is extended from 10-

*Relevant Docket Entry**Date**Proceedings*

22-74 to 12-23-74—and that the deft's motion retnble on 10-22-74 is extended to 1-7-75. So ordered—Cannella, J.

- Dec. 23, 1974 Filed stip & order that the time for pltff. to serve any answering affdvts, etc. in opposition to deft's motion is extended from 12-23-74 to 1-29-75—and that deft's motion retnble on 1-7-75 is retnble on 2-10-75. So ordered—Cannella, J.
- Jan. 29, 1975 Filed memorandum of law in opposition to deft's motion to dismiss complaint or to compel answer to its interrogatories.
- Feb. 10, 1975 Filed supplement to pltff's memorandum.
- Feb. 10, 1975 Filed Reply memorandum of deft.
- May 14, 1975 Filed Opinion #42,414—for the reasons stated, the motion of the United States pursuant to FRCP 12 (b) (6) is hereby granted. The Clerk of the Court shall enter judgment dismissing the complaint with prejudice and costs. It is so ordered—Cannella, J. (m/n)
- May 16, 1975 Filed Judgment—ordered that the deft. have judgment against the pltff. dismissing the complaint with prejudice, and with costs to be taxed. Clerk (m/n)

Relevant Docket Entries

<i>Date</i>	<i>Filings—Proceedings</i>
July 2, 1975	Filed Bill of Costs as taxed in the sum of \$20.00 in favor of the deft. and docketed as Judgment #75,579
July 10, 1975	Filed plttf's notice of appeal from both the order entered on 5-14-75 and the judgment entered on 5-16-75, both of which dismissed the complaint with prejudice and costs. Copy mailed to: U.S. Atty, for S.D. of N.Y.
Sept. 19, 1975	Filed Notice that record has been Certified and transmitted to the USCA for the Second Circuit this day.

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITY OF NEW YORK,

Plaintiff,

—against—

UNITED STATES OF AMERICA,

Defendant.

Plaintiff, the City of New York, by its attorney, the Corporation Counsel of the City of New York, for its complaint herein, alleges and states:

I.

This is an action of a civil nature wherein plaintiff seeks refund of Federal excise taxes based on the charges for transportation of persons, erroneously, illegally and unconstitutionally assessed and collected from it by defendant. Jurisdiction is predicated upon 28 U.S. Code §1346 and §7422 of the Internal Revenue Code. Venue is proper in this district pursuant to 28 U.S. Code §1402.

II.

Plaintiff, the City of New York, is a municipal corporation and political subdivision of, the State of New York

Complaint

with principal offices at the Municipal Building, New York, New York.

III.

Prior to July 1, 1970, the provisions of Section 4292 of the Internal Revenue Code, excluded from the air transportation tax imposed by Section 4261 of the Internal Revenue Code, all air transportation services furnished to the government of any State or political subdivision thereof. Section 205(a)(2) of Public Law 91-258, 84 Stat. 241, effective July 1, 1970, amended Section 4292 of the Internal Revenue Code, so as to remove the foregoing governmental exemption from the tax imposed by Section 4261 of the Internal Revenue Code.

IV.

Pursuant to law all City officials and employees of the City of New York traveling on official, governmental City business are reimbursed by the City of New York, for the amount of their commercial transportation travel expense. From and after July 1, 1970, the amount of such reimbursement has included the excise tax imposed upon their commercial airline fares by Section 4261 of the Internal Revenue Code.

V.

The utilization of commercial airline travel by City officials and employees is in connection with and necessary to the accomplishment of their required govern-

Complaint

mental duties under the laws of the City and State of New York.

VI.

The City of New York, paid to the defendant, United States of America Twenty-One Thousand Dollars (\$21,000) during the period from July 1, 1970 to December 31, 1970, Forty-Two Thousand Dollars (\$42,000) during the calendar year 1971, and Seventeen Thousand, Five Hundred Dollars (\$17,500) during the period from January 1, 1972 to May 31, 1972, which amounts were for and represent the Federal excise taxes levied pursuant to and under Section 4261 of the Internal Revenue Code.

VII.

Pursuant to Section 7422 of the Internal Revenue Code and the rules and regulations of the Internal Revenue Service, on July 23, 1972, the City of New York filed a tax refund claim with the District Director, Internal Revenue Service, 120 Church Street, New York, New York in the amount of Eighty Thousand, Five Hundred Dollars (\$80,500) which represents the amount of excise taxes imposed upon the City of New York and paid by the City for the period from July 1, 1970 to May 31, 1972. That on or about September 7, 1972, at the request of the United States Internal Revenue Service the City of New York filed amended tax refund claims with the Director, Internal Revenue Service Center, Andover, Massachusetts, in the amount of Twenty-One Thousand Dollars (\$21,000) for the period from July 1, 1970 to December 31, 1970, and Forty-Two Thousand Dollars (\$42,-

Complaint

000) for the calendar year 1971, and Seventeen Thousand, Five Hundred Dollars (\$17,500) for the period from January 1, 1972 to May 31, 1972, which figures represent the amounts of the Federal excise taxes levied under Section 4261 of the Internal Revenue Code. A copy of the refund claim and amended refund claims are attached to this complaint and made part thereof as Plaintiff's Exhibit A, and Exhibits A-1, A-2 and A-3.

VIII.

On January 19, 1973, the Director, Internal Revenue Service Center, Andover, Mass. 01810, notified the City of New York, by certified mail, with a statutory notice, that the Plaintiff's claims for refund were rejected by the Internal Revenue Service. A copy of the rejection letter is attached to this Complaint as Plaintiff's Exhibit B.

IX.

The Federal excise tax imposed upon the air travel of City employees carrying out lawful and required duties in a manner necessary to the functioning of the government of the City of New York is an unconstitutional infringement by the Federal government of the immunity of the City of New York and constitutes an impermissible tax burden upon the City of New York.

By virtue of the foregoing, the defendant became and is indebted to plaintiff in the amount of Eighty Thousand, Five Hundred Dollars (\$80,500) for wrongfully assessed and collected excise taxes, which amount has not heretofore been credited or refunded either to plaintiff or to anyone else.

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3 Tax p

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6 Less:

7 Amou

9 Net a

Under

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Dated, J

1970) of the Treasury Revenue Service	Claim	Director's Stamp (Date received) JUN 28 1972 RECEIVED FED. REV. SERV. NEW YORK, N.Y.
Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required. Refund of Taxes Illegally, Erroneously, or Excessively Collected. Refund of Amount Paid for Stamps Unused, or Used in Error or Excess. Abatement of Tax Assessed (not applicable to income, estate or gift taxes).		
Please Type or Print Plainly		

Taxpayer or purchaser of stamps CITY OF NEW YORK		City or town, State, and ZIP code NEW YORK, NEW YORK 10007
Address street MUNICIPAL BUILDING CHAMBERS & CENTRE STREETS		
Fill in applicable items—Use attachments if necessary		
Social security number	Wife's number, if joint return	b. Employer identification number (if any)
Revenue Service office where re- turn was filed	d. Name and address shown on return, if different from above	
If for tax reported on annual basis, prepare separate form for each taxable year JULY 1, 1970, to MAY 31, 1972		f. Kind of tax FEDERAL EXCISE TAX ON TRANSPORTATION OF PERSONS BY AIR.
Amount of assessment \$500.	Dates of payment CONTINUOUSLY THROUGHOUT THE ABOVE PERIOD	
Stamps purchased from Gov- ernment	i. Amount to be refunded (If income tax, complete computation below) \$80,500.	j. Amount to be abated (not applicable to income, estate, or gift taxes) \$

Claimant believes that this claim should be allowed for the following reasons: Commercial Airline transportation in New York City officials and employees performing essential City government functions has been subjected to the Federal Excise tax since July 1, 1970. This tax is collected by the various airlines and then remitted to the Federal Government. No refund or credit has been made to the taxpayer in respect to the tax payments nor has the taxpayer consented to the abatement or refund or credit to the collecting agency. The tax is unconstitutional and illegal since it constitutes a prohibited burden on the City, which abrogates its governmental immunity.

Computation of Income Tax Refund	Income Tax
Withheld	
Estimated tax paid	
Tax paid with original return	
Additional income tax paid	
Tax paid (add lines 1-4)	
Your computation of correct tax	
Amount of overpayment	
Amount previously refunded	
Overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

CITY OF NEW YORK
Signed *[Signature]* **COMPTROLLER**
CORPORATION COUNSEL
JUNE 23, 1972
See instructions on reverse. Form 843 (Rev. 12-70)


EXHIBIT A.

10a

**Plaintiff's Exhibits A-1 through A-3, Annexed To
Complaint**

Plaintiff's Amended Refund Claims

[PHOTOSTATS]

(Opposite) 

Form 843

(Rev. Dec. 1970)
Department of the Treasury
Internal Revenue Service

AMENDED

Claim

Director's Stamp
(Date received)

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please type or Print Plainly

Name of taxpayer or purchaser of stamps

CITY OF NEW YORK

Number and street MUNICIPAL BUILDING
CHAMBERS & CENTRE STREETS

City or town, State, and ZIP code

NEW YORK, NEW YORK 10007

Fill in applicable items—Use attachments if necessary

a. Your social security number

b. Wife's number, if joint return

c. Employer identification number (if any)

c. Internal Revenue Service office where return (if any) was filed

d. Name and address shown on return, if different from above

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year

From July 1, 1970, to December 31, 1970

f. Kind of tax FEDERAL EXCISE TAX ON
TRANSPORTATION OF PERSONS BY
AIR.

g. Amount of assessment

\$ 21,000.

Dates of payment

CONTINUOUSLY THROUGHOUT THE ABOVE
PERIOD

h. Date stamps were purchased from Government

i. Amount to be refunded (If income tax, complete computation below)

\$ 21,000.

j. Amount to be abated (not applicable to income, estate, or gift taxes)

\$

k. The claimant believes that this claim should be allowed for the following reasons:

Commercial Airline transportation of New York City officials and employees performing essential City governmental functions has been subjected to the Federal Excise tax since July 1, 1970. This tax is collected by the various airlines and then remitted to the Federal Government. No refund or credit has been made to the taxpayer with respect to the tax payments nor has the taxpayer consented to the allowance or refund or credit to the collecting agency. The tax is unconstitutional and illegal since it constitutes a prohibited burden on the City, and violates its governmental immunity.

Computation of Income Tax Refund

Income Tax

- 1 Tax withheld
2 Estimated tax paid
3 Tax paid with original return
4 Any additional income tax paid
5 Total tax paid (add lines 1-4)
6 Less: Your computation of correct tax
7 Amount of overpayment
8 Amount previously refunded
9 Net overpayment (enter in item 1 above)

RECEIVED
NOT VERIFIED
SEP 12 1972
INT. REV. SERVICE
MANHATTAN NY #7

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

CITY OF NEW YORK

Signed

COMPTROLLER

CORPORATION COUNSEL

Dated Sept. 7, 1972

GPO: 1971 O - 438-471

See instructions on reverse.

Form 843 (Rev. 12-70)

Exhibit A-1

Form **843**
(Rev. Dec. 1970)
Department of the Treasury
Internal Revenue Service

AMENDED

Claim

Director's Stamp
(Date received)

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps

CITY OF NEW YORK

Number and street MUNICIPAL BUILDING

City or town, State, and ZIP code

CHAMBERS & CENTRE STREETS NEW YORK, NEW YORK 10007

Fill in applicable items—Use attachments if necessary

a. Your social security number

Wife's number, if joint return

b. Employer identification number (if any)

c. Internal Revenue Service office where return (if any) was filed

d. Name and address shown on return, if different from above

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From January 1, 1971, to December 31, 1971
f. Kind of tax FEDERAL EXCISE TAX ON TRANSPORTATION OF PERSONS BY AIR.

g. Amount of assessment

Dates of payment CONTINUOUSLY THROUGHOUT THE ABOVE PERIOD

h. Date stamps were purchased from Government

i. Amount to be refunded (If income tax, complete computation below)

j. Amount to be abated (not applicable to income, estate, or gift taxes)

\$ 42,000.

k. The claimant believes that this claim should be allowed for the following reasons: Commercial Airline transportation of New York City officials and employees performing essential City governmental functions has been subjected to the Federal Excise tax since July 1, 1970. This tax is collected by the various airlines and then remitted to the Federal Government. No refund or credit has been made to the taxpayer with respect to the tax payments nor has the taxpayer consented to the allowance or refund or credit to the collecting agency. The tax is unconstitutional and illegal since it constitutes a prohibited burden on the City, and violates its governmental immunity.

Computation of Income Tax Refund

Income Tax

- 1 Tax withheld
2 Estimated tax paid
3 Tax paid with original return
4 Any additional income tax paid
5 Total tax paid (add lines 1-4)
6 Less: Your computation of correct tax
7 Amount of overpayment
8 Amount previously refunded
9 Net overpayment (enter in item 1 above)

RECEIVED
NOT VERIFIED
SEP 12 1972
INT. REV. SERVICE
MANHATTAN NY

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

CITY OF NEW YORK

Signed

COMPTROLLER

Dated Sept. 7, 1972

GPO : 1971 O - 438-677

See instructions on reverse.

CORPORATION COUNSEL (Rev. 12-70)

Exhibit A-2

Form **843**(Rev. Dec. 1970)
Department of the Treasury
Internal Revenue Service

AMENDED

ClaimDirector's Stamp
(Date received)

The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to income, estate or gift taxes).

Please Type or Print Plainly

Name of taxpayer or purchaser of stamps

CITY OF NEW YORK

Number and street MUNICIPAL BUILDING

City or town, State, and ZIP code

CHAMBERS & CENTRE STREETS NEW YORK, NEW YORK 10007

Fill in applicable items—Use attachments if necessary

a. Your social security number

Wife's number, if joint return

b. Employer identification number (if any)

c. Internal Revenue Service office where re-
turn (if any) was filed

d. Name and address shown on return, if different from above

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year

From January 1, 1972 to May 31, 1972

f. Kind of tax **FEDERAL EXCISE TAX ON
TRANSPORTATION OF PERSONS BY
AIR.**

g. Amount of assessment

\$ 17,500

Dates of payment

CONTINUOUSLY THROUGHOUT THE ABOVE PERIOD

h. Date stamps were purchased from Gov-
ernmenti. Amount to be refunded (if income tax,
complete computation below)

\$ 17,500.

j. Amount to be abated (not applicable to income,
estate, or gift taxes)

\$

k. The claimant believes that this claim should be allowed for the following reasons:

Commercial Airline transportation of New York City officials and employees performing essential City governmental functions has been subjected to the Federal Excise tax since July 1, 1970. This tax is collected by the various airlines and then remitted to the Federal Government. No refund or credit has been made to the taxpayer with respect to the tax payments nor has the taxpayer consented to the allowance or refund or credit to the collecting agency. The tax is unconstitutional and illegal since it constitutes a prohibited burden on the City, and violates its governmental immunity.

Computation of Income Tax Refund

Income Tax

1 Tax withheld	
2 Estimated tax paid	
3 Tax paid with original return	
4 Any additional income tax paid	
5 Total tax paid (add lines 1-4)	
6 Less: Your computation of correct tax	
7 Amount of overpayment	
8 Amount previously refunded	
9 Net overpayment (enter in item i above)	

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete. CITY OF NEW YORK

Signed



COMPTROLLER

Dated

Sept. 7, 1972

1972

GPO : 1971 O - 438-877

See instructions on reverse. CORPORATION COUNSEL

Form 843 (Rev. 12-70)

Exhibit A-3

204

**Plaintiff's Exhibit B, Annexed To Complaint
Copy of Rejection Letter To Plaintiff From
Internal Revenue Service**

DEPARTMENT OF THE TREASURY
Director
Internal Revenue Service Center
North-Atlantic Region
P.O. Box 1500, Andover, Mass. 01810

CERTIFIED MAIL

January 19, 1973 08660628 NF

City of New York
Attention: Raymond Herzog
Municipal Building, Room 1619
Chambers and Centre Streets
New York, New York 10007

Gentlemen:

We have examined your claim for refund of Federal Excise Tax on Transportation of Persons by Aircraft for the period July 1, 1970 to May 31, 1972.

I am sorry to tell you that we cannot allow your claim since the tax was imposed by the Airport and Airway Revenue Act of 1970 as of June 30, 1970.

This letter is your legal notice that your claim is disallowed in full.

If you wish to begin suit or proceedings for the recovery of any taxes, penalties, or other moneys for which this notice of disallowance is issued, the law requires you to do so within two years from the mailing date of this letter.

Sincerely yours,

F. L. BROWITT
F. L. Browitt
Director

Opinion of Cannella, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

W. Bernard Richland, Corporation Counsel of the City of New York (Samuel J. Warms and Raymond Herzog, Asst. Corp. Counsels, of counsel), for plaintiff.

Paul J. Curran, U. S. Attorney for the Southern District of New York (John S. Siffert, Asst. U. S. Attorney, of counsel), for defendant.

CANNELLA, D.J.:

This action was commenced by the City of New York pursuant to 28 U.S.C. § 1346 for the refund of certain excise taxes which have been paid to the Federal Government. The sole issue presented for our determination is whether the excise tax on amounts paid for transportation of persons by air under § 4261 of the Internal Revenue Code, 26 U.S.C. § 4261, may constitutionally be imposed on city expenditures for employees traveling on official city business. As we find that the constitutional doctrine of intergovernmental tax immunity does not bar the imposition of this tax, the motion of the United States to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) is hereby granted.

Opinion of Cannella, D.J.

THE FACTS

The City claims that during the period of July 1, 1970 through May 31, 1972 certain of its employees traveled by air while conducting necessary, official New York City business. These employees purchased and paid for air transportation and such air fare included the federal excise tax specified in § 4261. The employees were later reimbursed by the City for the expenses incurred.

On July 23, 1972, the City filed a claim for refund of the taxes now in suit—\$80,500. On January 19, 1973, the Internal Revenue Service notified the City that its claim had been rejected. Thereafter, on April 3, 1974, the instant action was commenced.¹

THE STATUTORY SCHEME

The excise tax provision here at issue (§ 4261), while a long-standing part of the Code, was significantly amended as part of the Airport and Airway Revenue Act of 1970;² legislation which was passed in conjunction with the Airport and Airway Development Act of 1970.³ The stated purpose of these enactments was to aid in the substantial expansion, improvement and development of the American airport and airway system in order to meet future needs and demands for these facilities.⁴

¹ The action appears to have been timely filed under 26 U.S.C. § 6532(a)(1) and venue is proper, 28 U.S.C. § 1402(a)(2).

² Title II, Pub.L. 91-258, 84 Stat. 236 (effective July 1, 1970).

³ Title I, Pub.L. 91-258, 84 Stat. 219.

⁴ See, § 2, Title I, Pub.L. 91-258, *supra*; H. Rep. No. 91-601, 91st Cong., 1st Sess. in 1970 U.S. Code Cong. and Admin. News at 3047 and 3082.

Opinion of Cannella, D.J.

With regard to the instant dispute, the changes which the 1970 Act effected upon § 4261⁵ are not as important

⁵ In its present form, § 4261(a) of the Code states:

(a) IN GENERAL.—There is hereby imposed upon the amount paid for taxable transportation (as defined in section 4262) of any person which begins after June 30, 1970, a tax equal to 8 percent of the amount so paid. In the case of amounts paid outside of the United States for taxable transportation, the tax imposed by this subsection shall apply only if such transportation begins and ends in the United States.

§ 4262, in turn, defines "taxable transportation" as "transportation by air" and further states:

(a) TAXABLE TRANSPORTATION; IN GENERAL.—For purposes of this part, except as provided in subsection (b), the term "taxable transportation" means—

(1) transportation by air which begins in the United States or in the 225-mile zone and ends in the United States or in the 225-mile zone; and

(2) in the case of transportation by air other than transportation described in paragraph (1), that portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States, but only if such portion is not apart of uninterrupted international air transportation. . . .

(c) DEFINITIONS.—For purposes of this section—

(1) CONTINENTAL UNITED STATES.—The term "continental United States" means the District of Columbia and the States other than Alaska and Hawaii.

(2) 225-MILE ZONE.—The term "225-mile zone" means that portion of Canada and Mexico which is not more

(Footnote continued on following page)

Opinion of Cannella, D.J.

as the impact which it had upon § 4292 of the Code (26 U.S.C. § 4292). Prior to July 1, 1970 (the effective date of the amendments), § 4292 exempted from the excise tax imposed under § 4261 "any payment received for services or facilities furnished to the Government of any State, Territory of the United States, or any political subdivision of the foregoing or the District of Columbia." The Airport and Airway Revenue Act of 1970, however, deleted the reference to § 4261 from § 4292,⁶ thus com-

(Footnote continued from preceding page)

than 225 miles from the nearest point in the continental United States.

(3) UNINTERRUPTED INTERNATIONAL AIR TRANSPORTATION.—The term "uninterrupted international air transportation" means any transportation by air which is not transportation described in subsection (a)(1) and in which—

(A) the scheduled interval between (i) the beginning or end of the portion of such transportation which is directly or indirectly from one port or station in the United States to another port or station in the United States and (ii) the end or beginning of the other portion of such transportation is not more than 6 hours, and

(B) the scheduled interval between the beginning or end and the end or beginning of any two segments of the portion of such transportation referred to in subparagraph (A)(i) is not more than 6 hours. . . .

⁶ Prior to the 1970 amendment § 4292 stated:

Under regulations prescribed by the Secretary or his delegate, no tax shall be imposed under section 4251 or 4261

(Footnote continued on following page)

Opinion of Cannella, D.J.

pletely withdrawing from the law the previous statutory grant of immunity accorded to New York City and other political entities. The rationale for this legislative decision is made abundantly clear in the House Report, which states:

Present law provides a series of exemptions from the tax on transportation of persons by air. These include exemptions: . . . (5) for transportation furnished to the United States (at the discretion of the Secretary of the Treasury) and to State and local governments. . . .

The Ways and Means Committee has deleted most of these exemptions either as obsolete provisions or as unnecessary complications of existing law. . . .

. . . .

. . . .

The exemptions for transportation furnished to State and local governments, the United States, and nonprofit educational organizations are terminated. . . . It did not seem appropriate to continue

(Footnote continued from preceding page)

upon any payment received for services or facilities furnished to the Government of any State, Territory of the United States, or any political subdivision of the foregoing or the District of Columbia.

§ 205(a)(2) of the Airport and Airway Revenue Act of 1970 (Title II, Pub.L. 91-258, 84 Stat. 236) deleted the phrase "or 4261" from the statute. (§ 4251 imposes a tax on certain communications services, such as telephone services, and is not here relevant.)

Opinion of Cannella, D.J.

special exemptions for these governmental and educational organizations since this tax is now generally viewed as a user charge. In this situation there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities. Moreover, should these exemptions be retained where now applicable, it would be difficult to see why other equally meritorious nonprofit organizations should not also be granted exemption.

H. Rep. No. 91-601, 91st Cong., 1st Sess. in 1970 U.S. Code Cong. and Admin. News at 3090-91.⁷ Hence, under the present statutory scheme the only basis upon which the City might avoid the air transportation excise tax is under the constitutional doctrine of intergovernmental tax immunity.

INTERGOVERNMENTAL TAX IMMUNITY

The City premises its present claim upon the assertion that "a political subdivision of a state which exercises governmental functions may not be subjected in performing those functions to a federal tax."⁸ Thus, it relies upon the intergovernmental tax immunity which is said to arise by implication from the federal constitution;

⁷ For further discussion of the legislative history of the provisions at bar, *see*, *Texas v. United States*, 72-2 U.S. Tax Cas. ¶ 16,048 at 86,128 (W.D. Tex. 1972), *aff'd mem.*, 73-1 U.S. Tax Cas. ¶ 16,085 at 81,394 (5 Cir. 1972).

⁸ City's Brief at 8.

Opinion of Cannella, D.J.

a doctrine which finds its origin in *McCulloch v. Maryland*, 17 U.S. 316 (1819). The doctrine enjoyed great success and was frequently invoked by courts during the late nineteenth and early twentieth centuries and it is upon the case law generated during this earlier period that the City places principal reliance.⁹ However, as Professors Freeland and Stephens have observed: "Despite its bold beginning and vigorous earlier life, the doctrine of intergovernmental immunity has suffered a marked decline over the past half century." J. Freeland & R. Stephens, *Fundamentals of Federal Income Taxation* 247 (1972). A particularly crushing blow to the

⁹ In chronological order, the cases cited by the City are: *Collector v. Day*, 78 U.S. 113 (1870); *South Carolina v. United States*, 199 U.S. 437 (1905); *Ohio v. Helvering*, 292 U.S. 360 (1934); *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1939); and *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). These decisions, together with other leading immunity cases and *New York v. United States*, 326 U.S. 572 (1946), are digested and discussed in: E. Barrett & P. Bruton, *Constitutional Law* 483-495 (4th ed. 1973); P. Kauper, *Constitutional Law* 452-488 (4th ed. 1972); G. Gunther & N. Dowling, *Constitutional Law*, 752-765 (8th ed. 1970); W. Lockhart, Y. Kamisar & J. Choper, *Constitutional Law*, 440-460 (2nd ed. 1967); McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. Rev. 485, 488-493 (1973). Each of these authors recognizes that the immunity doctrine is only a shadow of its former self and that the courts have, during the more recent years, restricted its scope with each decision.

The leading pre-*New York v. United States* articles in this area are those of Professor Thomas Reed Powell. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633; and *The Remnant of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 757 (1945).

Opinion of Cannella, D.J.

pre-existing doctrine came in 1946, when the Supreme Court decided *New York v. United States*, 326 U.S. 572 (1946). That case stands as the Court's most recent pronouncement in this area and is, in the opinion of this Court, clearly preclusive of the City's claim. The opinions of the several Justices in *New York v. United States* render the earlier decisions of but historical interest and, to use Professor Griswold's phrase, "the doctrine of immunity was limited" in scope and utility by the views there expressed. E. Griswold, *Federal Taxation* 29 (6th ed. 1966).

The Court's decision in *New York v. United States* is itself somewhat curious precedent because no opinion of the Court actually exists. Mr. Justice Frankfurter "announced the judgment of the Court and delivered an opinion in which Mr. Justice Rutledge joined." 326 U.S. at 573. Mr. Justice Rutledge separately concurred and Chief Justice Stone, joined by Justices Reed, Murphy and Burton, issued a concurring opinion. Mr. Justice Douglas, joined by Mr. Justice Black, dissented. This division of the Court and the policy considerations which are attendant thereon, while of significance in a close case, are without impact in the matter at bar since no difference in result is obtained when the present facts are viewed through either the Frankfurter or Stone formulation.

Mr. Justice Frankfurter, after first noting that Article I, § 9 of the Constitution ("Congress can lay no tax 'on Articles exported from any State'" (326 U.S. at 575)) imposed the only direct constitutional limitation upon the federal taxing power viz-a-viz the states, recognized that other tax immunity doctrines derived from Chief Justice Marshall's famous phrase "the power to tax involves the

Opinion of Cannella, D.J.

power to destroy." *Id.* at 575-76. The Justice, in an apparent effort to simplify the immunity doctrine and advance a more workable standard, began his endeavor by outrightly rejecting the older premise of reciprocal intergovernmental tax immunity. Placing emphasis upon Mr. Justice Bradley's dissenting opinion in *Collector v. Day*, 78 U.S. 113, 128-29 (1870), Frankfurter concluded that reciprocity of tax immunities was an unwarranted inhibition upon the federal system of government. *Id.* at 577-82. In its place, Justice Frankfurter promulgated a new test of tax immunity—a standard which validates a federal tax which falls upon a state entity when the tax is found to be nondiscriminatory.

There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. [Citations omitted.] If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private

Opinion of Cannella, D.J.

vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy."

Id. at 582. Moreover, Justice Frankfurter expressly rejected the distinctions previously drawn between the "governmental" and "proprietary" functions of state and local entities as "to shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion." *Id.* at 580. He concluded by stating:

we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

Id. at 583-84 (footnote omitted).

Justice Frankfurter's brethren in the majority refused to accept all of the views that he had offered. Even Justice Rutledge, who concurred in the opinion, felt a need to express himself separately. *Id.* at 584-86. Four other Justices, in an opinion by Chief Justice Stone, felt compelled to limit the *per se* "nondiscriminatory test" formulated by Frankfurter.

While joining Justice Frankfurter in finding "untenable the distinction between 'governmental' and 'proprie-

Opinion of Cannella, D.J.

tary' interests," *id.* at 586, the Chief Justice expressed his reservations with regard to placing exclusive reliance upon the nondiscriminatory nature of a tax in the following words:

[W]e are not prepared to say that the national government may constitutionally lay non-discriminatory tax on every class of property and activities of States and individuals alike.

. . . [O]ur difficulty with the formula, now first suggested as offering a new solution for an old problem, is that a federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government.

Id. at 586-87. The difficulty encountered by the Chief Justice and his colleagues with Frankfurter's formulation is evidenced by the following passage:

If the phrase "non-discriminatory tax" is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo v. United States*, 319 U.S. 441, 447-448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and

Opinion of Cannella, D.J.

the tax, even though non-discriminatory, may be regarded as infringing its sovereignty.

Id. at 587. Thus, Chief Justice Stone concluded that the mere nondiscriminatory nature of a tax would not be enough to sustain its levy upon a state or locality. In addition, the Chief Justice indicated that "we [must] consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government. If it does, then the fact that the tax is non-discriminatory does not save it." *Id.* at 588.

Returning, then, to the matter at bar, we reiterate that these distinctions are not determinative to the outcome of this case. Clearly, the excise tax imposed by § 4261 of the Code is nondiscriminatory in nature. All users of air transportation facilities (with the limited exception of an international organization of the Red Cross) are equally subject to this tax. We cannot perceive any undue interference with the sovereign functions of City government as the result of its being compelled to contribute to the federal tax coffers in this particular instance. While it is difficult for us to conceive of a federal tax, other than those suggested in the opinions of the Court (*i.e.*, a tax on statehouses and cityhalls), which is both nondiscriminatory and yet unduly restrictive against a municipality,¹⁰ it is clear that the air trans-

¹⁰ While perhaps not entirely satisfactory, we offer the following example to illustrate this concept: A federal tax on all .38 caliber handguns (or bullets). Such a tax would apply to all who own such pistols: private citizens, detective agencies, and the like, as well as state and local governments. However, owing to the fact that the incidence of .38 caliber handgun ownership is greatest among state and local law enforcement agencies and that the possession of such firearms is vital to their proper functioning, it might well be said that although nondiscriminatory in scope, the tax, if of sufficient magnitude, could indeed unduly interfere with the sovereign functions of government.

portation excise tax is neither discriminatory nor does it unduly interfere with the governmental functions of New York City. As one commentator has put it, "any challenge to federal taxation of a state [or city] activity would require a showing of actual impairment of state [or city] functions." McCormack, *supra* n. 9 at 493. Plainly, no actual impairment of the City's functions has been demonstrated in this case.

The statutory exemption previously enjoyed by the City having been abrogated in 1970, we conclude that the constitutional doctrine of intergovernmental tax immunity will not properly assume its place. The City's claim of immunity from the excise tax imposed under § 4261 must be rejected. We add only that our view with regard to *New York v. United States* is fully supported by the following cases: *Murphy v. O'Brien*, 485 F.2d 671, 674-75 (T.E.C.A. 1973); *United States v. Washington Toll Bridge Authority*, 307 F.2d 330, 334 (9 Cir. 1962) (en banc), *cert. denied*, 372 U.S. 911 (1963); *Texas v. United States*, 72-2 U.S. Tax Cas. ¶ 16,048 at 86,128 (W.D. Tex. 1972), *aff'd mem.*, 73-1 U.S. Tax Cas. ¶ 16,085 at 81,394 (5 Cir. 1972);¹¹ *Iowa State Univ. of Science & Technology v. United States*, 500 F.2d 508, 523 (Ct. Cl. 1974).

¹¹ The decision of Judge Roberts in *Texas v. United States* squarely addresses the question of immunity for states and localities from the § 4261 tax. However, the Judge there placed emphasis upon the user charge aspect of the § 4261 levy, as contrasted with analyzing it as a true tax, and thus concluded that it was "as such . . . outside the scope of the doctrine of implied intergovernmental tax immunity." 72-2 U.S. Tax Cas. at 86,131. The Court went further and in what might be considered dictum recognized that

(Footnote continued on following page)

Opinion of Cannella, D.J.

CONCLUSION

The motion of the United States pursuant to Fed. R.Civ.P. 12(b)(6) is hereby granted. The Clerk of the Court shall enter judgment dismissing the complaint with prejudice and costs.

It is So ORDERED.

JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
May 14, 1975.

(Footnote continued from preceding page)

Even if the airway user charge is considered to be a tax within the general confines of the doctrine of implied inter-governmental tax immunity, plaintiff has now shown that the tax is invalid where it is nondiscriminatory, Congress specifically intended to tax this activity whether or not carried on directly by the State, and there exists no undue burden upon the performance of plaintiff's functions as a government which have long been recognized by the Constitution as sovereign. *New York v. United States, supra.*

As our discussion in the text *supra* indicates, we are in complete agreement with these views.

Judgment of Cannella, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant having moved the Court pursuant to Rule 12(b)(6), of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable John M. Cannella, United States District Judge, and the Court thereafter on May 14, 1975, having handed down its opinion granting the said motion, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendant United States of America have judgment against the plaintiff City of New York, dismissing the complaint with prejudice, and with costs to be taxed.

Dated: New York, N.Y.

May 16, 1975

RAYMOND F. BURGHARDT
Clerk

7/2/75—No appearance in opposition. Bill of Costs as taxed in the sum of \$20., in favor of the defendant, and added to the judgment, as judgt. #75,579

RAYMOND F. BURGHARDT
Clerk

U. S. District Court
Filed
May 16 1975
S. D. of N. Y.

Paul J. Curran (R.L.)

COPY RECEIVED

Oct. 21, 1975

UNITED STATES ATTORNEY